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No. 82-708
IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO THE MEMORANDUM FOR THE UNITED STATES.

JOHN K. VAN DE KAMP,
Attorney General of the
State of California,
N. GREGORY TAYLOR,
Assistant Attorney General,
NANCY ALVARADO SAGGESE,
Deputy Attorney General,
(Counsel of Record)
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2234,
Counsel for Respondent,
State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF IN OPPOSITION TO THE MEMORANDUM FOR THE UNITED STATES.

This brief is submitted in opposition to the views expressed by the United States in its Amicus Curiae Memorandum. The position therein taken is contrary to settled decisions of this Court and factual findings heretofore made in these proceedings. No federal question is presented, and accordingly, the Petition for Certiorari should be denied.

SUMMARY OF REASONS WHY CERTIORARI SHOULD BE DENIED.

Based upon the following summary of facts and law (including decisions of this Court), no federal issue is presented herein:

1. The federal government in its Memorandum admits that the lands in question were and are tidelands. (Memorandum, pp. 1-2.)

2. Under the laws of Mexico in effect at the time of the Mexican conveyance to Summa's predecessors in interest, tidelands were subject to a "public trust easement." This was established by Summa's expert on Mexican law through his testimony at the trial below. (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821; Reporter's Transcript, p. 1084.)

3. The original Mexican grant contains a *specific, express reservation* of such public rights, and the United States' Decree of Confirmation issued by the Board of Land Commissioners as well as the decision upholding the decree rendered by the United States District Court in the confirmation proceedings incorporate this language by reference, according to the record herein. (Reporter's Transcript, p. 1085; Exh. 1, pp. 61-63, 83-84; Pet. App. A-5, p. A-58.)

4. Even if there had been no *express reservation* of "public trust" rights in the conveyance to Summa's predecessors in interest, this Court long ago decided that "trust" interests are not affected by proceedings to confirm private titles conveyed by prior sovereigns upon cession to the United States. Such interests are not required to be placed before confirmatory bodies and are not terminated by an adverse ruling of such bodies. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58

U.S. 541; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

5. California recognizes the underlying fee title of Summa to the subject lands in accordance with prior decisions of this Court, none of which dealt with the incidents of such ownership. (*United States v. Coronado Beach Co.* (1921) 255 U.S. 472; *Knight v. United States Land Association* (1891) 142 U.S. 161; *San Francisco v. LeRoy* (1891) 138 U.S. 656.)

6. The federal government itself recognized that the public trust servitude exists over tidelands within ranchos in one of the above-cited cases. (*United States v. Coronado Beach Co.* (1921) 255 U.S. 472, 482.)

7. The incidents stemming from private ownership of property have traditionally been defined according to state law and this Court has consistently held that no federal question is presented as to such matters. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.)

8. Under long-settled California law, private titles to tidelands are subject to a retained "public trust" easement. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79; *Oakland v. Oakland Waterfront Co.* (1897) 118 Cal. 160, 50 P. 277.)

9. Nothing in the California Supreme Court's decision is violative of the Treaty of Guadalupe Hidalgo (9 Stat. 922), since the public trust rights were reserved and, in any event, the nature of Summa's private title is equal to that accorded citizens of the United States in California. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606

P.2d 362, 126 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) Were the position of the United States adopted, Mexican grantees would be afforded greater title interests than those accorded United States citizens, contrary to the mandate of the Treaty of Guadalupe Hidalgo. (9 Stat. 922, 929, Art. VIII.)

10. No interest of the United States is affected by this case in that it holds a similar title interest in the subject tidelands which is paramount to that of California. (*United States v. 1.58 Acres of Land, Etc.* (D. Mass. 1981) 523 F.Supp. 120, 123-125.)

DISCUSSION.

The position of the United States as set forth in its Memorandum as Amicus Curiae in this case represents, in Churchill's words, "a riddle wrapped in a mystery, inside an enigma." For in attempting to attack California's well-established common law public trust doctrine, the federal government has distorted its nature, ignored that doctrine's historic antecedents, and suggested, without support, a new and novel rule to the effect that incidents of title deraigning from Mexican grants must be treated differently from the other incidents of title that this Court has consistently held must be determined by state law. In so doing, the government has permitted philosophical predisposition to overcome considered legal judgment. Its analysis is erroneous and its conclusions are wrong.

The public trust in navigable waters is an ancient doctrine, with its roots in the Code of Justinian. Embodied in both civil and common law systems, it is observed in virtually every civilized western nation. (Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine* (1970) 79 Yale L.J. 762, 763-772.) Its ancestry in California is legitimate, for it stems both from Mexican law (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821) and the common law. (*People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) It has been observed and enforced in California throughout the State's history, as an inherent attribute of sovereignty. (*Id.*)

This is because of the fundamental importance of the tidelands and navigable waters to the people of a state or nation. Control over these areas has been consistently characterized as an inherent attribute of sovereignty; no more subject to abdication than the police power. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 453-454.) These

rights were preserved for the people under Mexican law. (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821; *Apalachicola Land & Development Co. v. McRae* (1923) 86 Fla. 393, 98 So. 505, appeal dismissed, 269 U.S. 531.) Nothing in the Act of 1851 (9 Stat. 631) or the Treaty of Guadalupe Hidalgo (9 Stat. 922) suggests that a different result should be reached, and that these preexisting rights should have been extinguished by the federal confirmation process. Although a great many excesses were perpetrated in the 19th century General Land Office, it has not been suggested until now that the federal confirmatory proceedings incidentally extinguished these ancient public rights.

For these reasons, it is particularly puzzling that the federal government has taken the position that these rights were somehow revoked with respect to tidelands that, by accident of history, were granted under Mexican rule and subsequently confirmed by a federal patent.

The principles set forth in the decision below are so clear and innocuous as to defy suspicion:

1. The lands in question are, as the government observes (Memorandum, pp. 1, 8 n. 4), clearly tidelands.

2. The federal government held tidelands in trust for the future state. When California was admitted into the Union, it assumed whatever rights were retained by the United States, as an incident of sovereignty. (*Barney v. Keokuk* (1876) 94 U.S. 324; *Shively v. Bowlby* (1894) 152 U.S. 1.)

3. The universal assumption, under both state and federal law, is that grants by the government (federal or state) do not convey interests held in its sovereign capacity; and all such grants are construed strictly against the grantee and in favor of the people in whose interest they are held. (*United States v. California* (1947) 332 U.S. 19.)

4. A federal patent conveyed under the Act of 1851 merely confirmed to the private title holder whatever interests were received from Mexico. (*Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339.)

These principles, applied to the tidelands of Ballona Lagoon, compel the conclusion that nothing in either state or federal law conferred upon these title holders an estate superior to that enjoyed by every other littoral owner on the California coast. For there are many thousands of acres of tidelands once owned by the State that have been conveyed into private ownership, yet by operation of law are still subject to the public trust. (*People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) Petitioner's property would simply fall into this category of land. Thus, contrary to the contention of the United States (Memorandum, p. 7), the State is not trying to treat privately owned tidelands as if they were owned by the State; rather the State is trying to treat petitioner the same as all other private property owners of tidelands within the State.[1]

Such a policy is within the *State's* prerogative, since, as this Court has repeatedly held, a confirmatory patent is not an independent source of title subject to interpretation under federal law. (*Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339; *Adam v. Norris* (1880) 103 U.S. 591.) The basic error in the government's analysis is its failure to follow this precedent, determining on its own that the rule enunciated

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[1]Apparently unbeknownst to the United States (Memorandum, p. 7), California does own navigable water bottoms and tidelands south of Sonoma. Although Mexican rancho grants were generally located south of this city, even the California Land Title Association (CLTA) acknowledges that tidelands and navigable waterways were rarely included in such grants. (CLTA Brief, p. 4.) Thus CLTA's adversarial hyperbole that title to over 8½ million acres of land included in rancho grants is clouded by this case, a charge evidently believed by the United States (Memorandum, pp. 11-12), has no basis in fact.

in *Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, a case requiring federal law to govern federal patents of public lands of the United States, ought to apply in the case of confirmatory patents as well. We submit that the government cannot substitute its judgment for that of this Court.

So too is the government's characterization of the riparian rights and pueblo water rights issues in *Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; and *Hooker v. Los Angeles* (1903) 188 U.S. 314, as being distinct from issues relating to "fullness of title" an attempt to avoid well-settled precedent established by this Court. (Memorandum, p. 5.) Indeed, the government has fashioned this "fullness of title" distinction out of whole cloth, for whether a riparian ownership extends to the river's high water mark or to mid-channel relates to "fullness of title"; likewise, a riparian farmer would consider his inability to divert river waters because of the existence of paramount pueblo water rights as relating to "fullness of title."[2] Yet both of these issues have been left to State determination. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314; *Hardin v. Jordan* (1891) 140 U.S. 371.) The public trust must be treated no differently from these other incidents of title; state law should govern here as well.

The government asserts that the holding below, by preserving the public trust rights of the public in the tidelands, violates the promise given in the Treaty of Guadalupe Hi-

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[2]Riparian rights are inseparably annexed to the soil and pass with it as a parcel of the land. (*Lux v. Haggin* (1886) 69 Cal. 255, 391.)

Pueblo water rights are a species of property in the water of streams within a pueblo's boundaries. Pueblos have title to such waters, subject to the public trust of distributing the water in just proportion. (*Vernon I. Co. v. Los Angeles* (1895) 106 Cal. 237, 248-249.)

dalgo that vested property rights would be "inviolably respected." (Memorandum, p. 9.) We believe the decision has just the opposite effect. By preserving public rights in public waters that existed under Mexican and Anglo-Saxon common law alike, that decision carries out the Treaty's mandate. The government's fallacy lies in an inexplicable and niggardly notion that the people are incapable of holding property rights; that such rights can exist only in private entities. Furthermore, in the instant case, the predecessors to the private entity involved herein expressly took title to the land subject to these public rights. (Exh. 1, pp. 20-22, Grant for Rancho La Ballona; Pet. App. A-1, p. A-9.) Thus recognition of this title is nothing more than a demonstration of inviolable respect for the title petitioner received.

It is plain that the United States has no respect for the public trust and fails to understand it. In describing the doctrine as "voracious"[3] and concluding that the servitude "wholly dispossesses" a property owner of all the benefits of his land (Memorandum, pp. 6-7), the United States reveals its feelings about the doctrine, but neglects to mention two important limitations prescribed by the California court: The existence of the public trust on privately owned lands does not deprive the owner of economic use of his lands. An owner of the lands subject to the public trust ". . . may use the property as he sees fit, subject to the power of the State to abate any nuisance he may create thereon, and to

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[3]The California court's decisions in *Lyon* and *Fogerty* do not, as the United States suggests (Memorandum, p. 6 n. 2), "extend" the public trust doctrine to nontidal, navigable waters. As those opinions amply show, the better (and majority) rule in this country has always been that this doctrine has always been applicable to such waters. (*State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 625 P.2d 256, 172 Cal.Rptr. 713, cert. denied, 454 U.S. 865; *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696, cert. denied, 454 U.S. 865.)

remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the State may not exercise the trust without compensating the owner. (*People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88; Calif. Pub. Res. Code § 6312.)

Uses consistent with the public trust have been held to include mineral exploration (*Boone v. Kingsbury* (1928) 206 Cal. 148, 181-184, 273 P. 797, 811-813, appeal dismissed and cert. denied, 280 U.S. 517) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas. (*Martin v. Smith* (1960) 184 Cal.App.2d 571, 577-578, 7 Cal.Rptr. 725, 728.) Petitioner is free to pursue its reasonable investment expectations by submitting development plans to appropriate officials. It is thus not true that the existence of the public trust "effectively recaptures" fee ownership of petitioner's land as the United States asserts. (Memorandum, p. 8.) Thousands of acres of other tidelands in private ownership in the State have already been successfully developed although subject to the trust. It is misleading and not true for the government to insinuate that these purchasers for value received nothing for their money.

In making these statements, the government mistakenly presumes that the State is "free to retain whatever easement it deems appropriate" when it relinquishes to the riparian or littoral owner its title to tidelands or banks below high water mark. (Memorandum, p. 7.) But this Court has held that the public trust may not be alienated or extinguished through alienation of the underlying fee. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387; see also *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.)

It is this understanding of the special quality of the public trust and the recognition that other governments have similar doctrines that led to this Court's holding in *New Orleans*

v. United States (1836) 35 U.S. (10 Pet.) 662, that trust interests survive a change in sovereignty. In *New Orleans*, the United States claimed that certain lands in the City of New Orleans had passed to it by the cession of Louisiana to the United States, that the City of New Orleans was asserting ownership of these lands, and that the city should be permanently enjoined from invading the dominion of the United States over this land. (35 U.S. at 711.)

The City of New Orleans claimed that while under the sovereignty of Spain and France this land had been dedicated by these former sovereigns for public use as quays and that this dedication survived the change in sovereignty. (35 U.S. at 711-712.)

This Court's first inquiry was as to whether the prior sovereigns could have impressed this property with public rights. The Court stated:

> "As the rights claimed by the city had their origin under the laws of France, and were enjoyed for nearly forty years under the laws of Spain, it becomes necessary to examine those laws, to ascertain the nature and extent of these rights." (35 U.S. at 718.)

This Court concluded that such public rights in property as claimed by New Orleans did exist under both sovereignties. (35 U.S. at 730-731.)

Next the Court noted that the city had presented its claims to the Board of Land Commissioners formed pursuant to the Act of March 2, 1805, "an act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana," and the Board had rejected the claim. (35 U.S. at 733-734.)

Nevertheless, this Court held that because the prior sovereign had held the land in trust for the city, the land had not passed to the United States by the treaty of cession as

"public lands of the United States." Neither had the public rights been extinguished through the confirmation proceedings. Rather, these rights had survived the change in sovereignty, had survived the confirmatory proceedings, and were now held by the State. (35 U.S. at 736-737.) In the words of this Court:

> "The state of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people." (35 U.S. at 737.)

The government's analysis of this case (Memorandum, pp. 9-10 n. 5), thus misses the point.

The government correctly states that in *Eldridge v. Trezevant* (1896) 160 U.S. 452, Louisiana recognized a public rights servitude arising under a prior sovereign by incorporating it into the Civil Code of Louisiana. (Memorandum, p. 10 n. 5.) But, again the government misses the point. This recognition of preexisting public rights, approved by this Court, exactly parallels the instant situation. If in *Eldridge* the public rights had not predated the private ownership, would not the codification of these public rights on private property have amounted to a taking? It is precisely because the public rights survived the change in sovereignty and survived the confirmatory proceedings that Louisiana was able to recognize these rights and apply them to grantees of France and Spain (confirmatory patentees) as well as

federal patentees such as Mr. Eldridge. Louisiana's recognition happened to take the form of a statute. In California, the recognition of the public rights in ranchos simply took the form of case law, but this Court's conclusion still obtains:

> "[T]he provisions of the Fourteenth Amendment [do not] extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State." (160 U.S. at 468.)

While on the one hand the government gives short shrift to the above cases expressly upholding public servitudes arising under a prior sovereign, stating that the issuance of the patent "ends the matter" (Memorandum, p. 9), it apparently has deemed it unnecessary to cite any authority for the proposition that the federal navigational servitude survived the issuance of the patent. (Memorandum, pp. 10-11.)

The government quite simply states that the patent to petitioner's predecessors did reserve the federal navigational servitude. (Memorandum, pp. 10-11.) If the patent did so, it did so *silently* because there was no express reservation of this interest. On the other hand, the government states that *no* interest passed to California (Memorandum, pp. 9, 11) on the basis that the patent contained no express reservation of any state interest.[4] It is clear that while the government desires to blanket private property owners with protection from state interference, it is not willing to go so far as to protect private interests from the exercise of its

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[4]While the confirmatory patent was silent on this issue, the original Mexican grant expressly reserved public rights within the rancho. (Exh. 1, Grant for Rancho La Ballona.) This reservation was not only broad enough to reserve the State's public trust servitude, but the federal navigational servitude as well.

own servitude. Yet if the federal servitude survived the patent, it is because this interest is guaranteed by the U.S. Constitution, not because the patent reserved it. Although the government acknowledges that the sovereign public trust interest would have passed to the State through the Equal Footing Doctrine (Memorandum, pp. 10-11), also guaranteed by the U.S. Constitution, the government refuses to admit that it too would have survived. The government's conclusion seems to have guided its analysis.

The final mystery of the federal brief lies in its concession that there is no great federal interest in this case on the basis of its effect on federal land, yet it couples this concession with dark hints that military or other reservations will be subjected to "pervasive control by the State invoking its 'public trust' rights." (Memorandum, p. 13.) Neither public trust rights or any other state sovereign prerogatives have withstood the overriding powers of the federal government acting to impose its navigational servitude under the commerce clause, or to legislate for federal enclaves. (See, *e.g.*, *Kleppe v. New Mexico* (1976) 426 U.S. 529; *United States v. Rands* (1967) 389 U.S. 121; *United States v. Willow River Co.* (1945) 324 U.S. 499.)

More importantly, in our system of dual sovereignty, the federal government itself is administrator of the trust. (*United States v. 1.58 Acres of Land, Etc.* (D. Mass. 1981) 523 F.Supp. 120, 123.) And the State's administration of the public trust is subject to the paramount rights of the federal government to administer its trust with respect to matters within its powers. (*Id.*) Thus, it is most surprising that the United States would fear the existence of a "pervasive public trust."

CONCLUSION.

Even before the adoption of the Erie doctrine, federal common law was not applied to state real property cases. (*Swift v. Tyson* (1842) 41 U.S. (16 Pet.) 1, 18-19; *Wilcox v. Jackson* (1839) 38 U.S. (13 Pet.) 498, 517.) The interest of the United States at this late date in changing this rule is supported neither by precedent nor a respect for a healthy federal system. The entire California coastline is, as it should be, subject to the same rules of state law. This rule is neither unusual nor novel. What is unusual is the willingness of the federal government to impose a policy preference under the guise of federal constitutional doctrine. No basis exists for the Court's jurisdiction here.

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Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California,
N. GREGORY TAYLOR,
Assistant Attorney General,
NANCY ALVARADO SAGGESE,
Deputy Attorney General,
(Counsel of Record),
Counsel for Respondent,
State of California.